



**THE ATTORNEY GENERAL  
OF TEXAS**

November 7, 1988

**JIM MATTOX  
ATTORNEY GENERAL**

DEAR ELECTION OFFICIAL:

I have enclosed for your information a copy of an opinion issued by my office today.

The opinion was requested by Representative Ernestine Glossbrenner as Chair of the House Elections Committee. Representative Glossbrenner indicated that the questions posed in this opinion may be relevant to you in the upcoming November 8, 1988 General Election.

If you need any assistance on election day, please feel free to contact my office.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive, flowing style.

**J I M   M A T T O X**  
Attorney General of Texas



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OF TEXAS**

November 7, 1988

**JIM MATTOX  
ATTORNEY GENERAL**

Honorable Ernestine Glossbrenner  
Chair  
Committee on Elections  
Texas House of Representatives  
P. O. Box 2910  
Austin, Texas 78769

LO-88-125

Dear Representative Glossbrenner:

You ask several questions regarding the challenge of voters in the polling place and the presiding election judge's authority under certain circumstances. You also inquire about the authority of the absentee ballot board to reject absentee ballots voted by mail. Finally, you ask about the selection of election clerks who do not reside within the election precinct for which they will serve.

The answers to most of your questions are found in the Election Code (hereinafter the Code). Unless otherwise indicated, all section references are to the Election Code.

Chapter 63 of the Code governs the acceptance of voters for voting in a polling place. Section 63.010(a) allows any person lawfully within the polling place to challenge a person's eligibility to vote. Section 63.010(d) requires the presiding judge to inform the challenged voter of the challenge and of the issues raised by the challenge. Section 63.010(e) requires the voter's acceptance for voting if the voter executes an affidavit that states the facts necessary to support the voter's eligibility to vote.

Generally, a person is eligible to vote in a particular precinct if the person is a qualified voter residing in the territory covered by the election and satisfies all other requirements for voting prescribed for the particular election. Elec. Code § 11.001. To be a qualified voter, a person must be a United States citizen, a resident of the state, at least 18 years of age, and a registered voter. The person must not have been determined mentally incompetent by a final judgment of a court or have been finally convicted of a felony or, if so convicted, he must

satisfy the requirements of section 11.002(4) of the Code.  
Id. § 11.002.

To be eligible for registration as a voter, a person must satisfy the requirements of a qualified voter listed above, except that a person may apply for registration if he is at least 17 years and 10 months of age. A person must also be a resident of the county in which application for registration is made. Id. § 13.001.

You first ask whether the presiding election judge may require a person challenging a voter's right to vote to provide grounds for the challenge before the judge requires the voter to execute an affidavit to establish the voter's eligibility. This question is answered unambiguously by the statute. Section 63.010(d) places a duty on the presiding judge to "inform a voter of a challenge and of the issues raised by the challenge." The presiding judge may only require a voter to execute an affidavit after the judge informs the voter of the grounds for the challenge. Therefore, whenever a voter is challenged by someone other than the presiding judge, the person making the challenge must state the grounds of the challenge to the presiding judge to enable the judge to comply with section 63.010(d).

One circumstance about which you inquire is a challenge by a watcher or an election inspector who demands that a voter present some form of identification before voting. A challenge pursuant to section 63.010 is one that addresses eligibility to vote. Because proof of one's identity is neither a requirement for registration nor a qualification for voting, a challenge may not be made merely because a voter does not have identification in his possession when offering to vote. The Code does not permit a voter's acceptance to be conditioned on the voter's presentation of any form of identification at the polling place. No person may demand that a voter present identification in order to vote.

The Code creates various criminal offenses to prohibit illegal voting. Id. § 64.012. That section makes it an offense for a person to vote or attempt to vote in an election in which the person knows he is not eligible to vote and also creates an offense for a person knowingly impersonating another person and voting or attempting to vote as the impersonated person. The penalty for such illegal voting is a felony of the third degree. If a person is convicted of attempted illegal voting, the offense is a Class A misdemeanor.

You next ask about the use of the challenge procedure when citizenship is at issue. As stated earlier in this opinion, United States citizenship is both a qualification for voting and a requirement for registration as a voter. Therefore, a challenge based on citizenship is authorized by the Code. However, the challenge procedure prescribed by the Code does not authorize any election officer or any other person within a polling place to demand that a voter present proof of citizenship when offering to vote.

Whenever the challenge procedure is invoked, the challenged voter must be accepted for voting upon the execution of an affidavit stating facts that support the voter's eligibility to vote. Id. § 63.010(e). In the instance of a challenge based on the citizenship qualification, the voter must swear that he is a United States citizen. There is no requirement that a voter document that fact before he is allowed to vote.<sup>1</sup>

You ask about the authority of a presiding judge to ignore or reject challenges based on citizenship unless the challenger provides probable cause for the challenge. You describe a situation where the citizenship status of Hispanic voters is routinely challenged for no apparent reason other than the fact that the voters belong to an identifiable minority group.<sup>2</sup>

The Code does not expressly authorize a presiding judge to require proof from a challenger before conducting a

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1. Provision is made elsewhere in the Code for the challenge of a person's registration. See ch. 16, subch. D. This challenge procedure requires the registered voter making the challenge to file an affidavit with the voter registrar stating the grounds of the challenge. Judicial review of the voter registrar's determination of the registration eligibility of the challenged voter is authorized.

2. The routine challenge of Hispanic voters' citizenship status would, in my opinion, be violative of 42 U.S.C. 1973c (the Federal Voting Rights Act), which prohibits the implementation of any discriminatory voting practice or procedure aimed at minority voters. We will not read the Election Code to authorize a procedure that contravenes federal law.

challenge. However, the Code establishes the presiding judge as the officer in charge of the polling place and vests the presiding judge with the responsibility for the management and conduct of the election at the polling place. Id. § 32.071. As the officer in charge, the presiding judge is required to preserve order and prevent breaches of the peace and violations of the Code. Id. § 32.075. The presiding judge's authority to keep order and prevent breaches of the peace is equivalent to that of a district judge. Id. In connection with this responsibility, the presiding judge may issue arrest warrants and appoint special peace officers. Id.

In our opinion, if a presiding judge encounters a situation in which a watcher, election inspector, or any other person makes multiple challenges of voters' citizenship status which the presiding judge considers to be frivolous and disruptive of the orderly conduct of the election, the judge has the power to instruct the challenger to refrain from making such challenges.

You next ask if the presiding judge has the authority to eject a person from the polling place if the person fails to follow the judge's instruction to refrain from disruptive behavior. If a challenger persists in challenging voters' citizenship status after being warned to cease disrupting the orderly conduct of the election, the judge may order the challenger's removal from the polling place under his authority to keep order and prevent breaches of the peace.

Next you inquire whether a presiding election judge has judicial immunity from any liability for ejecting from the polling place a person who fails to comply with the judge's order to cease disruptive behavior.

Judicial immunity is a general principle of common law "that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871). This doctrine has been adopted for actions filed in Texas courts. Spencer v. City of Seagoville, 700 S.W.2d 953 (Tex. App. - Dallas 1985, no writ).

However, it is necessary to point out that a judge is immune from civil actions for monetary damages only; there is no judicial immunity from criminal liability, Shore v. Howard, 414 F.Supp. 379 (N.D. Tex. 1976), nor from

injunctive or declaratory relief. Pulliam v. Allen, 466 U.S. 522 (1984).

We read your question to assume the lawful exercise of power by an election judge. As previously discussed, the presiding judge is responsible for maintaining order in the polling place and ensuring the orderly process of the election. It is clear from section 32.075(c) that the election judge has "the power of a district judge to enforce order and preserve the peace, including the power to issue an arrest warrant." An election judge with such powers is a judicial officer. Hooks v. State, 71 Tex. Crim. 269, 158 S.W. 808 (1913).

Absolute judicial immunity extends to all judicial acts performed by a judicial officer which are not performed in the clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349 (1978).

Whether the act of an election judge in ejecting a person from the polls is a judicial act may be determined by four factors:

- (1) whether the precise act complained of is a normal judicial function;
- (2) whether the acts occurred in the courtroom or appropriate adjunct spaces;
- (3) whether the controversy centered around a case pending before the judge; and
- (4) whether the acts arose directly out of a visit to the judge in his official capacity.

McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972).

A district judge in Texas possesses the power to eject persons from the proceedings he conducts as provided by Government Code Section 21.001 as follows:

- (a) A court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including the authority to issue writs and orders necessary or proper in aid of its jurisdiction.

(b) A court shall require that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done.  
(Emphasis added.)

In our opinion, the ejection from the polling place of a person who disrupts the order and expeditious manner of the proceedings by an election judge is an exercise of normal judicial power and jurisdiction. The polling place is the equivalent of a courtroom for an election judge, for this is the place in which the judge may exercise his judicial authority. Elec. Code § 32.075.

Although the determination of whether the remaining factors listed above exist in a particular case of ejection is a factual determination that may not be made in the opinion process, several points are clear. These factors should be broadly construed in favor of immunity. Also, it is not necessary to give the factors equal weight. Adams v. McIlhany, 764 F.2d 294, 297 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

We conclude, therefore, that a presiding election judge who lawfully exercises his power to eject a person from the polling place possesses judicial immunity from civil action for monetary damages.

You also ask about the authority of the absentee ballot board to reject ballots voted by mail because of defects in the applications for such ballots. We understand your inquiry to be directed to the treatment of "regular" absentee mail ballots under Title 7, Subtitle A, of the Code and not to ballots voted under Subtitle B, "Special Forms of Absentee Voting," or Subtitle C, "Restricted Ballot." Accordingly, we limit our discussion to regular absentee mail ballots voted under Title 7, Subtitle A.

It is the clerk's duty to determine which applicants are entitled to vote absentee by mail and are therefore entitled to be sent a ballot. Section 84.001 provides that a person must make an application as provided by the Code to be entitled to vote absentee. Sections 82.001 et seq. state various grounds for voting absentee by mail. The requirements for the mail ballot application are prescribed by sections 84.001 et seq. The clerk must review these requirements in determining whether to accept or reject an application.

Section 86.001 provides that the absentee voting clerk shall review each application and, if the applicant is entitled to vote absentee by mail, shall provide a ballot to the applicant. If the applicant is not entitled to vote absentee by mail, the clerk must reject the application and may not provide a ballot to such applicant. If the reason for rejection is a defect in the application, the clerk must notify the applicant, and, if the defective application was received on or before the 12th day before the election, the clerk must deliver a new application to the applicant with instructions for submitting it. Id. § 86.008. The clerk is also permitted to deliver second applications to persons who have timely applied on defective application received later than the 12th day. Id. § 86.008(d).

Section 86.001 also provides that the clerk shall reject an application if the applicant is not a registered voter unless the clerk can determine from the voter registrar that the applicant will have an effective registration by election day. The clerk also rejects applications received for ballots for elections for which he is not acting as absentee voting clerk.

If the clerk accepts the application and sends a ballot to the applicant and receives the marked ballot back, properly delivered, by poll closing time on election day enclosed in the official "carrier" envelope supplied for the ballot's return, the clerk places the "carrier" envelope, containing the ballot, and the application, in a "jacket" envelope and delivers the jacket envelope and its contents to the absentee ballot board. Id. §§ 86.011-86.013, 87.021.3

The absentee ballot board is the body responsible for processing absentee results. Id. § 87.001. Section 87.041 provides for the absentee ballot board's acceptance of mail ballots. Subsection (b) of that section states the criteria the board must use in determining whether to accept a ballot.

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3. Section 86.011 also provides a procedure allowing the clerk to deliver a defectively executed carrier envelope to the voter and receive a corrected envelope before the deadline.



(b) A ballot may be accepted only if:

(1) the carrier envelope certificate is properly executed;

(2) neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness;

(3) the voter's ballot application states a legal ground for voting absentee by mail;

(4) the ballot was timely returned to the absentee voting clerk by the proper method;

(5) the voter is registered to vote, if registration is required by law; and

(6) the address to which the ballot was mailed to the voter, as indicated by his application, was outside the voter's county of residence, if the ground for voting absentee is absence from the county of residence. (Emphasis added.)

Notably, the board's authority to reject ballots because of a defect in the application is quite limited in comparison with the clerk's duty to reject defective applications as discussed above. The underscored language in subdivisions (2), (3), and (6) of subsection (b), provides the only basis for the board to reject a ballot for defects in the application.

Section 87.041 as originally enacted in the 1985 recodification of the Election Code provided that a ballot may be accepted by the absentee ballot board only if the voter's ballot application "complies with the applicable requirements of this title." Acts 1985, 69th Leg., ch. 211, § 1, at 913. This provision was deleted by 1987 legislation apparently out of concern that voters could be improperly disenfranchised if they made defective applications but nonetheless received ballots and voted. Acts 1987, 70th Leg., ch. 472, § 34, at 2070. Under current section 87.041 it is clear that the absentee ballot board may not reject

absentee ballots for any defect in the application except as expressly authorized in section 87.041(b).

It might be argued that section 86.003 provides an additional ground for the ballot board to reject a ballot for a defect in the application. That section provides in relevant part:

(b) Subject to Subsection (c), the balloting materials shall be addressed to the mailing address specified in the voter's application. If no mailing address is specified, the materials shall be mailed to the voter's residence address unless a different address is required by Subsection (c). The election officer providing the ballot may not knowingly mail the materials to an address other than that prescribed by this section.

(c) The mailing address must be the voter's residence or temporary living quarters unless:

(1) the ground for voting absentee is absence from the county of residence, in which case the address must be an address outside the voter's county of residence; or

(2) the ground for voting absentee is confinement in jail, in which case the address must be the jail.

(d) If the mailing address specified in a voter's application is an address other than that prescribed by Subsection (c), the voter's ballot may not be counted. (Emphasis added.)

Section 86.003 has not been amended since its incorporation in the 1985 Election Code. The 1987 amendment to section 87.041, which deletes the provision that the absentee ballot board must reject a ballot if the application does not comply with the requirements of Title 7, is the more recent enactment and also the more specific with regard to the scope of the board's authority to reject ballots. Only the ground for not counting the ballot indicated in subsection (c)(1) of section 86.003 -- that the voter applied to vote absentee by mail on grounds of absence

from the county but did not give an address outside the county to which the ballot was to be mailed -- is also given in section 87.041 (subsection (b)(6)).

Accordingly, we follow the rules of statutory construction that the most recent and the most specific enactment governs, and conclude that section 86.003 does not authorize the ballot board to reject ballots for application defects except to the extent that such grounds are also stated in section 87.041.

Finally, you ask whether the presiding judge must appoint as a clerk a voter who does not reside in the precinct if nominated by the county chairman of the opposing party pursuant to section 32.034(b) of the Code.

You refer to the emergency appointment provision of section 32.051(b). However, your question relates to the appointment of clerks, not judges, and thus the emergency appointment provisions of section 32.051(b) are inapplicable.

Section 32.034, relating generally to appointment of election clerks from different political parties, provides in part:

(b) The county chairman of a political party whose candidate for governor received the highest or second highest number of votes in the county in the most recent gubernatorial general election may, not later than the 25th day before a general election or the 10th day before a special election to which Subsection (a) applies, submit to a presiding judge a list containing the names of at least two persons who are eligible for appointment as a clerk. If a timely list is submitted, the presiding judge shall appoint at least one clerk from the list, except as provided by Subsection (c).

(c) If only one additional clerk is to be appointed for an election in which the alternate presiding judge will serve as a clerk, the clerk shall be appointed from the list of a political party with which neither the presiding judge nor the alternate judge is affiliated or aligned, if such a list is submitted. If two such lists are submitted,

the presiding judge shall decide from which list the appointment will be made. If such a list is not submitted, the presiding judge is not required to make an appointment from any list. (Emphasis added.)

If the other requirements of section 32.034 are met, the election judge must appoint a clerk from a list submitted to him by a county chairman if the list contains "at least two persons who are eligible for appointment as a clerk."

The eligibility requirements for a clerk are prescribed by section 32.051(c). To be eligible for appointment as clerk a person must be a qualified voter of the county, part of the county, or other political subdivision in which the election is held, but need not be of the particular election precinct in which he will serve.

Before 1977, state law required clerks to be residents of the election precinct in which they were appointed to serve. When this requirement was changed in 1977 (Acts 1977, 65th Leg., ch. 649, § 1, at 1652) to reflect current law, the U.S. Justice Department, acting pursuant to 42 U.S.C. 1973c, indicated that any political subdivision wishing to implement the relaxed residency requirement for clerks must have that change approved by the Justice Department prior to implementation. However, by letter of October 18, 1988, the Justice Department indicated that prior approval by each political subdivision is not necessary.

Thus, under current law, a person need not be a resident of a particular election precinct to be "eligible for appointment as a clerk" within the meaning of section 32.051.

#### S U M M A R Y

Election Code section 63.010 requires a person challenging a voter's eligibility to vote to state the grounds for the challenge to the presiding judge. The judge must inform the challenged voter of the challenge and of the issues raised by the challenge.

A voter's acceptance for voting may not be conditioned on the voter presenting proof of identification. The challenge procedure

prescribed by section 63.010 may not be invoked merely because a voter does not present proof of his identity when offering to vote.

The routine challenge of Hispanic voters' citizenship status is not authorized by either state or federal law. A presiding judge may instruct a challenger to refrain from challenges that the judge determines are frivolous and disruptive of the orderly conduct of the election.

Under his power to maintain order and prevent breaches of the peace, a presiding judge may order the removal of any person who fails to follow the judge's warning to refrain from disruptive behavior in the polling place.

A presiding judge who lawfully exercises his power to eject a person from the polling place possesses judicial immunity from civil action for monetary damages.

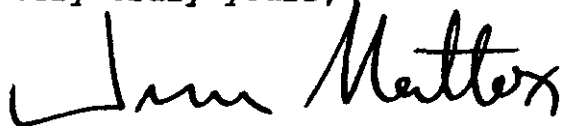
The absentee ballot board is authorized by section 87.041 of the Election Code to reject a ballot for defects in the application only if:

1. The voter's signature on the application is determined to have been executed by someone other than the voter, unless the application is signed by a witness;
2. The application does not state a legal ground for voting; or
3. If the ground for voting absentee by mail as indicated in the application was absence from the county, the address to which the ballot was to be mailed, as indicated by the application, was not outside the county.

If the requirements of Election Code section 32.034 are met, an election judge

must appoint a clerk from a list submitted to him by a county chairman of a political party if the list contains "at least two persons who are eligible for appointment as a clerk." Pursuant to section 32.051, subsection (c), a person is eligible for appointment as clerk if he is a qualified voter of the county, party of the county, or political subdivision in which the election is held. He need not be a qualified voter of the particular election precinct in which he will serve.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jim Mattox". The signature is fluid and cursive, with a large initial "J" and a stylized "M".

J I M   M A T T O X  
Attorney General of Texas

JAM/er

Ref.: ID# 4895